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ABSTRACT

The Information Society places new demands on the training of lawyers and the American civil justice system and tests the legal profession's capacity to adapt to change. This report investigates those demands and suggests ways to facilitate the necessary adaptation. It outlines a cohesive vision of legal education which begins with a recommended pre-law curriculum; proceeds to the acquisition of doctrinal knowledge, analytical abilities, and research skills during law school; includes compulsory post-graduate training in practical skills in conjunction with undertaking private practice; and concludes with the mandatory continuation of legal education for all active bar members. In addition, the report focuses upon the following major issues in the administration of civil justice: accelerating dispute resolution and lowering its cost; engendering a commitment to pro bono service; enhancing professional competence; and allaying public distrust. The report begins with an overview of the legal profession in New England, including the role of lawyers, profiles of law schools, and technology and the law. Next, critical issues involving the education and training of lawyers are discussed. Finally, critical issues involving legal administration of civil justice are examined, including legal fees, alternatives to litigation, lawyer-referral services, and small-claims reform. (GLR)

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LAW AND THE INFORMATION SOCIETY:

Observations, Thoughts and Conclusions about
Legal Education, Law Practice and the New England Economy

NEW ENGLAND BOARD OF HIGHER EDUCATION

Commission on the Legal Profession
and the Economy of New England

FOREWORD

Law is a much-maligned profession. New Englanders are as critical of lawyers as anyone else, sometimes for good reason, and on occasion out of shortsightedness and scapegoating. However, few in the region would deny the significant impact that lawyers have had on our society, our economy, our heritage and, of course, on our constant search for equity and justice.

Given that impact, it is appropriate that the New England Board of Higher Education included in its 1980s agenda an assessment of the challenging and perplexing world of lawyers.

Recognizing that the caliber of social and economic justice in the United States is profoundly influenced by the quality of legal training, NEBHE's Commission on the Legal Profession and the Economy of New England has used the region's 13 law schools as the foundation for this assessment.

That foundation makes this review unique. The legal profession has been the subject of constant analysis from national and state perspectives. But rarely, if ever, has the bar been examined from a regional standpoint. During the 1980s, New England's unique compactness, common culture and vibrant economy, we believe, compelled such an assessment.

It is also fitting for historical reasons that this assessment of legal education and the legal profession focuses on New England. It was Connecticut that 350 years ago adopted America's first written constitution, the *Fundamental Orders*. Massachusetts produced the most extensive and best-organized bar in colonial America, as well as one of the nation's oldest institutions for the training of legal minds—Harvard Law School in Cambridge.

New England has served as the laboratory for a variety of historic and lasting innovations in the law. It is reasonable to assume that the state bars throughout New England will be of critical importance in the decades ahead as the legal profession confronts new challenges and demands.

Skyrocketing legal costs have become the bane of the American public. While the ranks of the legal profession have grown steadily, many of our citizens cannot gain access to legal services. Minority groups are not represented adequately in the profession, or in some cases, by the profession. These challenges are formidable, but for the most part, not insurmountable. They do raise a pressing question: Is it too much to ask that the best legal minds in the nation's most economically vital region commit themselves to taming the legal-cost beast, while expanding access to justice?

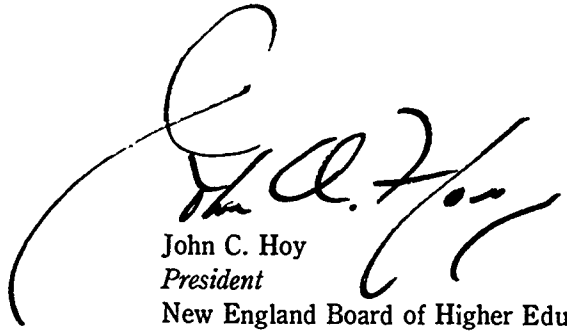
New England's legal community has shown its ability to adapt quickly to changing needs. For example, today's knowledge-driven and globally competitive economy has fostered the internationalization of the legal profession. Conversely, America's competitive position in the world economy has been strengthened by the New England law firms that are intimately involved in massive financial and commercial transactions that cross national borders each day.

Though data are scarce, we know that the number of U.S. firms maintaining offices abroad doubled from 1965 to 1984. The experience of several Commissioners suggests that many law firms now derive a far greater share of their revenues from international work than they did five years ago.

With publication of *Law and the Information Society,* the New England Board of Higher Education ends a decade of important inquiries into the relationship between New England's economic development and the region's more than 260 colleges and universities.

Like NEBHE's earlier benchmark reports, *Law and the Information Society* is the product of thoughtful, forward-looking men and women from the six New England states.

The work of the Commission on the Legal Profession and the Economy of New England, under the distinguished and deeply committed leadership of Chair Thomas P. Salmon and Vice Chair Ansel B. Chaplin, closes a decade, but does not end NEBHE's commitment to exploration of the links between economic development and higher education. These links are vital in both good times and bad. They reveal the true nature of New England's strengths and clarify its weaknesses, allowing our citizens to confront the future with courage, insight and a sense of equity and fair play.



John C. Hoy
President
New England Board of Higher Education

October 1989
Boston, Massachusetts

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A. OPENING STATEMENT

For 200 years "the rule of law" has served as the keystone of American society. Our legal system has been far from perfect, and there clearly have been notable exceptions to the even-handed administration of justice. But, in the main, it has quite consistently dispensed a commendable level of civil justice to its citizens.

The American legal system has demonstrated the capacity to adapt to, and even nurture, unparalleled changes in the ways our citizens earn their livings and relate to each other. In 1789, the legal system supported a quite homogeneous population of 4 million people and a largely agrarian economy based substantially upon the virtues of independence and self-reliance. Today, 250 million Americans of widely different ancestry function with substantial harmony in a highly sophisticated network of interdependent relationships which economists have come to call the Information Society.

The Information Society puts new demands on the training of lawyers and the civil justice system, and tests yet again the legal profession's capacity to adapt to change.

The Information Society puts new demands on the training of lawyers and the civil justice system, and tests yet again the legal profession's capacity to adapt to change. This Commission undertook to investigate those demands and to suggest ways to facilitate the necessary adaptation.

We have reached several conclusions regarding the interface of the legal profession with the present economy. The advent of an economic system based upon the storage, manipulation and transmission of data has not made legal representation readily available to the poor, nor has it made legal services comfortably affordable for most of the 70 percent of our citizens who find themselves in the middle class. On the other hand, our evidence suggests that the new economy has not caused lawyers to become chronically overpaid, though they remain generally well-paid.

Despite lawyers' zeal as advocates of civil rights, consumer safeguards and environmental protection, the public is generally thought to harbor an unflattering image of the profession. But a recent Connecticut poll shows that such is not universally the case. Litigation continues to be bedeviled by the expense and intractable delays which seem to characterize our civil justice system, yet tort law, in practice, remains fundamentally equitable. Certainly our citizens enjoy more rights and remedies than our forefathers could have imagined.

Barriers to entry into the profession have largely disappeared for women, but are still present for minorities. Advancement within the profession by both groups is undoubtedly hindered by unarticulated bias. For both women and minorities, complete access to the administration of equal justice also remains a major problem.

Law schools do not make an intensive effort to teach all their students practical skills, which creates a substantial gap in the formal training of new lawyers. A license to practice law certifies the possession of doctrinal knowledge and analytical skills rather than the ability to perform sound legal work. Yet none of our states requires any substantial practical-skills training subsequent to law school and coincident with admission to the bar. Moreover, participation in continuing legal education in New England is purely voluntary, except in Vermont.

This report outlines a cohesive vision of legal education which begins with a recommended pre-law curriculum; proceeds to the acquisition of doctrinal knowledge, analytical abilities and research skills during law school; includes compulsory post-graduate training in practical skills in conjunction with undertaking private practice and concludes with mandatory continuing legal education for all active members of the bar. In addition, the report focuses upon major issues in the administration of civil justice whose resolution in an effective manner is integral to

the continued health of the economy and society as a whole. In that context, it seeks to identify means to accelerate dispute resolution and lower its cost, to engender a commitment to *pro bono* service, to enhance professional competence, and to allay public distrust.

This report is a beginning. Follow-up meetings, seminars and conferences will focus on its recommendations and develop pragmatic strategies to implement its objectives. In that manner, we expect to promote the kind of quiet reform which will improve the day-to-day functioning of our legal system without disturbing its essential fabric.

Respectfully submitted,

Thomas P. Salmon
Chair

Ansel B. Chaplin
Vice-Chair

B. The Commission's Charter

The New England Board of Higher Education formed this Commission in 1986 to review legal education and law practice in New England with general reference to their relationship to the regional economy as a whole. Within that expansive jurisdiction, we were left to chart our own course.

In order to hold to a manageable compass, we left to one side the functioning of the criminal justice system. Instead, we looked broadly at the participation of lawyers in the vibrant economy which the northeastern United States has been enjoying. We then proceeded to analyze some of the issues which will challenge legal educators, lawyers and lawyering in our region in the coming decade. In the process, we have developed a number of recommendations designed to enhance significantly the contribution of the legal profession to the common weal. We have also developed an extensive series of working papers, many of which were published in NEBHE's Winter 1989 issue of *Connection: New England's Journal of Higher Education and Economic Development* under the heading "Thinking About the Law."

C. Executive Summary

The Commission has prepared a series of integrated recommend ions to enhance the training of lawyers as we prepare to enter the 21st Centur:.

Thr Commission begins with an overview of New England's legal profession in the Information Society, and finds that during the past 25 years the ratio of lawyers to population has doubled. Where the ratio was roughly 1-to-600 a quarter century ago, it is now 1-to-300. In fact, the ratio of lawyers has been growing not only in relation to the growth in population, which it far exceeds, but also in relation to the growth of the economy, which it directly approximates. The Commission concludes that these growth ratios are not coincidental, and that lawyers have played a central role in New England's economic renaissance.

Since 1965, New England's law schools have done more than their share in training lawyers. Those 13 schools educate more lawyers than employment opportunities in the region warrant, so the area serves as a considerable net exporter of legal talent. Admission of women to law school is approaching a sex-blind level, and female law graduates are now entering private practice at nearly the same rate of frequency as their male counterparts.

The New England schools as a whole enroll and graduate more minority students, proportionately speaking, than the percentage of minorities in the regional population, but still less than the national average. Since New England is such a major national resource for the education of lawyers, efforts should be made to bring the law school minority population into balance with national figures.

For both women and minorities, there are strong indications that barriers continue to exist so far as advancement within the profession and attainment of equal justice before the courts are concerned. These barriers must be identified and eradicated.

Technology has revolutionized the law office since 1965, to the point that word processors, high-speed printers. photocopiers, facsimile machines, optical scanners, voice mail and electronic research systems have become an accepted way of life Traditional law libraries--academic, state and county as well as those in major law firms--remain essential resources. Although the New England Law Library Consortium has made significant progress in providing interlibrary access to regional collections as a whole, outlying areas are at a severe disadvantage in obtaining access to legal information beyond the standard law reports. The fully electronic library is still a promise, not a reality.

The Commission has prepared a series of integrated recommendations to enhance the training of lawyers as we prepare to enter the 21st Century. To begin with, it suggests experimentation at the college level with courses in pre-law education, including a rigorous introduction to the principles which underlie an adversarial system of justice.

At the law school level, the Commission applauds the continuing trend towards increased training in the practical application of legal principles and analytical skills for the benefit of clients with particular legal problems. It suggests that a useful evolution would be the development of a distinct emphasis upon practical-skills training during the third year of law school.

The need for such training is rooted in the accelerating decline of the historic mentorship approach to training lawyers, by which it was assumed that newly admitted members of the bar would undergo a period of *de facto* apprenticeship in a law office before beginning to counsel and represent clients. That decline is essentially due to the fact that there has been such an increase in the number of new lawyers entering the profession that one-on- one training is no longer conceptually

feasible even if it could be justified on economic grounds. While major law firms can develop in-house training programs, that option is not viable for most law offices.

In addition to increased emphasis on practical-skills training during law school, the Commission recommends mandatory transitional education (so-called "bridge-the-gap" training) in conjunction with admission to the bar, and mandatory continuing legal education throughout a lawyer's active career.

The Commission recommends mandatory transitional education (so-called "bridge-the-gap" training) in conjunction with admission to the bar, and mandatory continuing legal education throughout a lawyer's active career.

As a part of the need for institutional responses to the problem of practical instruction for new lawyers, a sharply divided Commission recommends further that a requirement of mandatory *pro bono* service be imposed upon newly admitted attorneys in connection with transitional education.

The nature and extent of any *pro bono* obligation for new and experienced lawyers should be made the subject of public debate throughout the region. A requirement such as 100 hours of service spread over five years might be an appropriate quota for a new lawyer to meet. Experienced lawyers will be needed in considerable numbers to supervise newly admitted members of the bar in order to ensure that high quality services are delivered in a timely manner to the poor and disadvantaged.

The Commission finds that there is no clear evidence of a "glut" of lawyers. It is concerned that the cost of legal services is too high for the middle class and out of reach for the poor. This report points out ways in which prepaid legal insurance and lawyer referral programs are addressing the cost issue directly. Increased use of alternative dispute resolution (ADR) and expanded small-claims jurisdiction can also be cost-effective in certain situations. Paralegals and more efficient use of technology also have the potential to contain legal costs, if not reduce them.

The Commission emphasizes that all legal fees, whether set on an hourly basis or on a contingency, must be "reasonable under all the circumstances." This universal standard makes it possible for any client to challenge any fee which seems too high.

Litigation costs in personal-injury cases can be very substantial, and there are serious questions as to the capacity of the insurance industry to meet the extensive and novel exposures which imaginative lawyering has created in recent years. Corrective reforms need a chance to work before we can evaluate them and determine whether further changes are needed in the tort area.

There is an ever-present risk that the affluent can afford to retain highly skilled legal talent to obtain disproportionate advantages in our adversarial system of justice. This report seeks ways to maintain the classic even balance in the scales of justice.

The Commission did not review the criminal justice system, an area which requires separate consideration. As for civil justice, though litigiousness can be shown statistically to be on the rise, that increase appears to be attributable to the ever-increasing rights and remedies which ensure personal freedom, safeguard consumers and protect the environment. Emphasis in reform efforts should be concentrated upon controlling the discovery process. Some states like Massachusetts and Maine need more trial judges so they can meet the regional and national norms for the number of judges in relation to population.

In summary, one can readily find informed observers who greatly praise, as well as those who stridently decry, the functioning of our civil legal system. There is an ever-present risk that the affluent can afford to retain highly skilled legal talent to obtain disproportionate advantages in our adversarial system of justice. This report seeks ways to maintain the classic even balance in the scales of justice.

D. Summary of Recommendations

Minority Enrollment in Law School

Since nearly half of all graduating law students in New England find their first employment outside this region, the law schools should make an intensive effort to matriculate minority students in proportion to the percentage of minorities in the U.S. population, even though that percentage substantially exceeds the ratio of minorities to total population in New England.

Clinical Legal Education

Further steps should be taken to integrate clinical education (both simulated and live-client) into the standard law school curriculum. This kind of development is necessary in view of the declining opportunities for new lawyers to enjoy mentorship supervision upon starting practice. The Commission recommends that every student take at least one intensive clinical course during the second or third year of law school or participate in legal aid, voluntary defenders or advanced moot court activities for at least a semester.

Transitional Education

The Commission recommends that each New England state institute a mandatory "bridge-the-gap" course to provide "how-to-do-it" training for newly admitted members of the bar and assist them in the effective application of legal principles and reasoning for the benefit of clients.

Mandatory Continuing Legal Education

The Commission recommends that the five other New England states join Vermont in imposing a Continuing Legal Education (CLE) requirement upon the practicing lawyers in each jurisdiction. The equivalent of 15 hours a year of CLE is now required in a majority of U.S. jurisdictions.

Legal Fees

The public needs to become more aware of the fact that, in accordance with the Canons of Professional Responsibility, *every* legal fee must be "reasonable" in light of all the circumstances. By the same token, lawyers constantly need to keep in mind, and act upon, that principle.

Legal Insurance

The legal needs of the middle class are not being met in a cost-effective manner. The Rhode Island State Bar has pioneered a plan which provides group-insurance coverage for fundamental legal matters. The other statewide bar associations in the region should adopt comparable plans.

Lawyer Referral Services

The existence of lawyer-referral panels which charge reduced rates to low-income clients should be publicized, and their use expanded throughout New England.

Small Claims Jurisdiction

Small-claims court has proven to be an effective means of disposing of minor claims quickly at minimal legal expense. The typical ceiling on small-claims jurisdiction is $1,500 at the present time. The Commission recommends a significant increase in the jurisdiction of small claims courts to $5,000.

Additional Judges

Delays in adjudication due solely to the backlog of cases is a problem in some areas of New England. The congestion in the Massachusetts courts, state and federal, is approaching gridlock. Massachusetts and Maine have significantly fewer judges in respect to population than the national average. The Commission recommends that both states increase the size of their judiciary to at least the national average for judges per 100,000 population.

Procedural Reform

Both Kentucky and Oregon have developed procedural reforms designed to accelerate the disposition of cases. The New England states should institute comparable reforms in terms of tracking schedules and voluntary agreements as to discovery matters.

Pre-Legal Education

The Commission recommends that two prototype courses be developed for experimental use in New England's colleges and universities. One would investigate the ways in which lawyers who practice in various representative settings go about advancing the interests of clients while remaining true to their obligations as officers of the court. It would introduce students to the varied roles of private practitioner, in-house counsel, criminal prosecutor, administrative hearing officer, judge and so forth. The second course would explain the relative function of trial and appellate courts, introduce students to federalism from a lawyer's point of view, explore some of the basic assumptions of an adversarial system and describe such fundamental Common Law concepts as reasonable man, proximate cause and burden of proof. As an alternative to these courses, colleges might opt to cover the same material through lectures or symposiums given by local attorneys and judges.

Public Service

Lawyers, as a group, frequently work for little or no compensation and without publicity to make sure that the poor and elderly are adequately represented. However, individual lawyers vary widely in their commitment to *pro bono* work. On a national level, the American Bar Association has rejected the notion that all

lawyers have a non-delegable duty to dedicate some of their time to *pro bono* activity.

Nevertheless, the Commission recommends that the New England jurisdictions encourage debate over the extent of *pro bono* legal services needed and ways to meet these needs. The debate should expressly consider our further recommendation that newly admitted lawyers be required to contribute some minimum number of hours to *pro bono* representation during their first few years of practice. The public dialogue should also discuss whether experienced lawyers should also be expected to make some minimum *pro bono* contribution, including supervision of *pro bono* work by new members of the bar.

Compulsory IOLTA

All of the New England states have programs which encourage lawyers to deposit clients' funds held for a short time in a special account on which most of the interest earned is used to fund designated providers of legal services for the poor and disadvantaged. Connecticut has already made its IOLTA (Interest on Lawyer Trust Accounts) program compulsory, and Massachusetts and Vermont have done so effective next year. The Commission recommends that the other New England states do likewise.

Legal Information Resources

Despite intense budgeting pressures, each of the New England state legislatures should find ways to increase funding for state, county and court law libraries and for the acquisition of public computer terminals for legal research in those libraries.

Tort Reform

Because of the spate of tort reform legislation enacted since 1986, no further corrective legislation should be enacted until there has been an opportunity to evaluate what progress has been made under the reforms to date in New England and throughout the United States.

II. AN OVERVIEW OF THE LEGAL PROFESSION IN THE INFORMATION SOCIETY

Before analyzing critical issues confronting the legal profession in New England today, it is desirable to survey where lawyers stand in the economy, where and how they are trained, and what resources are available to them.

A. THE ROLE OF LAWYERS IN THE NEW ENGLAND ECONOMY

New England, a singular success story in economic revitalization, sustains an exceptionally high concentration of lawyers. Nationally, between 1960 and 1985, the number of licensed attorneys grew twice as fast as the labor force, and four times as fast as the population. At the same time, New England sustained roughly the same growth rate for lawyers, but had much smaller growth in total population:

PERCENTAGE INCREASE IN NUMBER
OF LAWYERS, LABOR FORCE AND POPULATION, 1960-1985

	Lawyers	Labor Force	Population
United States	135%	65%	32%
New England	126%	65%	21%

Since the regional population grew only two-thirds as fast as the national population during this period, the net effect was a significant increase in the ratio of lawyers to New England's citizenry as a whole:

LAWYER TO POPULATION RATIO (1960-1985)

State	1960	1985
Connecticut	1/645	1/277
Maine	1/987	1/457
Massachusetts	1/496	1/262
New Hampshire	1/954	1/457
Rhode Island	1/806	1/381
Vermont	1/791	1/541
New England	**1/601**	**1/302**
United States	1/627	1/360

In fact, the ratio of lawyers to population has doubled in New England over the last 25 years.

The year 1960 served as our economic baseline. In that year. U.S. Gross National Product (GNP) was $515 billion, and America had 286,000 lawyers. 1985 marked the closing year for comparative purposes. In that year, GNP had soared to $4 trillion, and the ranks of the legal profession had more than doubled to 655,000 licensed lawyers. Over the same 25 years, New England's share of GNP went from an estimated $30 billion to $259 billion, and the number of its lawyers from 18,000 to 40,000.

Concurrently, both New England and the nation were experiencing a dramatic, and sometimes wrenching, shift from a manufacturing to a service-based economy. New England had historically been a high-income region compared with the rest of the country, but, by 1978, its average *per-capita* personal income stood only 1

percent ahead of the nation's. In the mid-1970s, New England had suffered the twin miseries of the nation's highest unemployment rate and subpar income growth. Today, however, it enjoys the lowest unemployment rate as well as the highest income level of any region in the country.

While manufacturing still remains the keystone of the economy, making possible many of the supporting jobs held by the personal service workforce, it does appear that Clark Kerr's insight in his Godkin Lectures at Harvard University in 1963 has proven to be prophetic:

> *"What the railroads did for the second part of the last century, and the automobile for the first half of this century, may be done for the second half of the century by the knowledge industry; that is, to serve as the focal point for national growth."*

Both nationally and regionally what John Naisbitt characterizes as "the megashift from an industrial to an information society" was accompanied by the explosive growth in the number of lawyers. Skeptics may consider that growth to be an essentially passive by-product of the emergence of the knowledge economy—a kind of necessary accompaniment to the formation of the complex economic interrelationships needed to foster the new information-based society. Others will suggest, to the contrary, that New England lawyers played a pivotal, and frequently creative, role in spearheading the conversion of an antiquated, increasingly insular manufacturing economy into a world leader in technology and finance. Without embracing either position, it is clear that the legal profession played a central and often indispensable role in negotiating the arrangements and preparing the documentation essential to capital formation and its infusion into the new ventures of the Information Society.

The legal profession joined with New England's technology, finance and higher education sectors to bring about the dramatic turnaround in the economy from the dismal days of 1975.

It seems to the Commission to be more than coincidence that the profession grew in rough proportion to the regional economy. Thus, it is our collective judgment that the legal profession joined with New England's technology, finance and higher education sectors to bring about the dramatic turnaround in the economy from the dismal days of 1975.

Most of the details with respect to what lawyers have actually done to foster the growth of the new economy have been necessarily veiled by the confidentiality of the attorney-client relationship. So we must leave to time, historians and biographers the thorough illumination and quantification of much of this professional activity. As Paul Freund, Harvard's distinguished University Professor, has observed: "In assessing the creative capacity of the law and its actual fulfillment, it is necessary to examine the products of the lawyer's office more attentively than the decisions of the courts...Until this side of the lawyer's work can be extricated, re-created and made visible...from lawyers' files, the history of the legal profession will remain unwritten."

In the end, there will always be a central role for lawyers in a society as dedicated as ours is to the rule of law. The exceptional array of rights and liberties afforded to every one of us is vouchsafed by lawyers. In the words of Justice Felix Frankfurter: "It is not hollow rhetoric to say that the comprehensive interests of man that are guaranteed by the protection given to 'life, liberty and the pursuit of happiness,' are in the keeping of lawyers."

Commission Findings

- During the period from 1960 to 1985, the ratio of lawyers to population in New England doubled, and in absolute terms the number of licensed attorneys increased from 18,000 to 40,000.

- The Commission is satisfied that lawyers played an important and often essential role in the economic renaissance which New England experienced during that quarter of a century, as evidenced most clearly by the fact that the growth in the profession broadly tracked the growth in the economy.

B. A PROFILE OF LAW SCHOOLS IN NEW ENGLAND

New England, with only 5.3 percent of the nation's population, accounts for 8.3 percent of all law school graduates in the United States; *i.e.*, about 60 percent more than its population share. This imbalance has been described by John C. Hoy as "New England's unique capacity for producing the professional talent needed by a knowledge-based economy."

New England is known not only for the high quality and unusual diversity of its 260 colleges and universities, but also for the general excellence of its 13 American Bar Association (ABA)-accredited law schools.

New England is known not only for the high quality and unusual diversity of its 260 colleges and universities, but also for the general excellence of its 13 American Bar Association (ABA)-accredited law schools, 11 independent and two public:

Connecticut:	University of Bridgeport School of Law University of Connecticut School of Law (public) Yale University Law School
Maine:	University of Maine School of Law (public)
Massachusetts:	Boston College Law School Boston University School of Law Harvard Law School New England School of Law Northeastern University School of Law Suffolk University Law School Western New England School of Law
New Hampshire:	Franklin Pierce Law Center
Vermont:	Vermont Law School

Rhode Island does not have its own law school.

By some measures, these institutions do not play a central role in the regional economy. Their enrollment of 10,700 students in J.D. programs accounts for less than 2 percent of all students pursuing higher education, and their annual expenditures amount to some $100 million, or 1 percent of the $10 billion spent each year by the region's educational sector. On the other hand, law school faculty in New England are often called upon to perform tasks of regional and national importance,

and law school graduates undoubtedly contribute substantially to the commercial and financial success of this region, albeit in ways difficult to quantify, as we have seen.

Moreover, New England is a significant exporter of legal talent. Over 45 percent of the law students trained in this region find their first employment outside the six-state area, which makes New England the largest "exporting" region in the country in this respect. Nevertheless, graduates of the New England schools fill nearly 80 percent of the annual job vacancies in this region.

We must make sure that the region's minority students are given a full opportunity to attend the region's own law schools.

The problem of access to law school for women appears to have largely disappeared. In 1960, women accounted for roughly 2.5 percent of all lawyers; in 1987, they represented some 40 percent of all graduating law students. Also disappearing is the gap between men and women in the entry into private practice. By 1984, 56 percent of all female law school graduates were going into private practice as opposed to 61 percent of all male graduates.

While it is clear from the Massachusetts Supreme Judicial Court's recent *Gender Bias Study* that women continue to face a plethora of obstacles once they become members of the bar, they no longer appear to face sex-based barriers to entry to law school or to private practice. A survey undertaken by the Commission also indicates that New England law firms are adjusting their personnel practices to create a working environment which is supportive of women. The interested reader is urged to review the *Gender Bias Study* for enlightenment as to the ways in which women experience prejudice before the courts.

Access to the legal profession for members of minority groups presents a less sanguine situation. The starting point was roughly the same as that for women; members of minority groups constituted some 2 percent of the legal profession in 1972. By 1984, nearly 10 percent of all graduating law students were of Black, Hispanic, Native American or Asian descent, but fewer than 45 percent of them were entering private practice. About 18 percent of our national population consists of members of these and other minority groups.

As a whole, the New England law schools register fewer minority students as a percentage of student population than do law schools nationally. However, they register a higher percentage of minority students relative to regional population than do law schools as a whole. One major reason for this situation is that New England is home to a relatively small share of the minority population of the United States, so that it is relatively easy to meet the regional ratio.

It appears that a disproportionate share of New England's minority law school population comes from outside the region. We must make sure that the region's minority students are given a full opportunity to attend the region's own law schools. Each individual law school also needs to review its own performance in the light of total group performance. Each school could substantially improve its low ratio of minority faculty members. That ratio undoubtedly has some chilling effect upon minority law student enrollment.

Related to law faculty ratios is the fact that the major law firms in the region also have few minority lawyers in their ranks. A major effort has recently been undertaken by a dozen major Boston law offices and two minority law firms to recruit minority law school graduates to work in that city. Many more efforts of this type are needed to attract, educate and retain increasing numbers of minority law students in New England. Given New England's role as the premier region in the country for educating young lawyers, it would be appropriate to strive for

a minority student population equal to the percentage for all minorities in the national population; namely, about 18 percent.

Commission Findings

- New England law schools are moving progressively towards sex-blind admissions.
- There is no evidence of discrimination against minority students. However, New England law schools can take affirmative steps to educate a greater number of such students and should eventually seek to graduate them at a level consistent with the national population average for minorities.
- Admitting more minority students to law school is only a part of the challenge. While women are now entering private practice in roughly equal percentages to men, minority graduates lag behind in that respect. This situation deserves continuing study as does the issue of what happens to both groups once they have entered private practice.

Just as there is justifiable social concern that those who can afford to pay for outstanding lawyers will achieve a disproportionate share of justice, so is there legitimate and increasing concern that only the wealthy enjoy full access to legal technology.

C. Technology and the Law in the Information Economy

Just as there is justifiable social concern that those who can afford to pay for outstanding lawyers will achieve a disproportionate share of justice, so is there legitimate and increasing concern that only the wealthy enjoy full access to legal technology.

A number of business machines were added to the typewriter in the typical law office during the 25 years under review. Photocopiers became universal, and word processors virtually standard. Critical to the utilization of word processors are associated printers, including those employing ultra high-speed laser technology.

Large firms now make ready use of optical scanners for copying large quantities of text onto disks. The FAX craze—high-speed facsimile transmission by telephone wires—developed at the very end of the period. Even the basic office telephone has become increasingly sophisticated, particularly in the areas of touch-tone dialing of extensions and so-called voice mail, a system which automatically records messages which can then be accessed only by the addressee.

Software for time-keeping, billing and financial accounting also have become commonplace. Computerized legal research systems are widely used.

Adequate access to legal information in New England through traditional library resources and the new information technology varies widely by locale and ability to pay. The more affluent law schools and the wealthier law firms and corporate law departments enjoy very good-to- excellent access. The other law schools and the bar generally are served less well. The public at large, except perhaps in the largest cities, has inadequate access, which is usually limited to poorly funded public law libraries.

Excluding those larger law firms and corporate law departments that maintain their own libraries and subscribe to sophisticated computerized research services,

most of the New England bar has until now depended for access to legal information upon law schools, county and court libraries and the few "public" computer terminals available in the region. In addition to the 13 law school libraries, there are at most 60 public and bar libraries and 35 "public" computer terminals accessible to the bar at large for research purposes at commercial rates in New England.

Most of the bar, county and court libraries in the region, except for a few in Connecticut and Massachusetts, do not even have a minimally adequate collection or a professionally trained librarian. The county and court library systems in New Hampshire, Rhode Island and Vermont are distinctly inadequate. Unfortunately, support for law school libraries is also weaker in those states than elsewhere in the region.

The ultimate promise of totally electronic libraries is unlikely to be fulfilled in the foreseeable future.

The public depositories remain the only means for many lawyers to obtain access to law reports. Interlibrary cooperative efforts, facilitated by improved electronic communications and information transmission, and by the New England Law Library Consortium, are making headway in making other forms of legal information available beyond the large metropolitan areas. Potentially, such efforts can extend the reach of local law libraries and enable them to tap the resources of larger and more specialized libraries, albeit at a price which appropriately compensates the source library.

The future will undoubtedly bring an expansion of existing databases for legal research—new databases on LEXIS and WESTLAW and on compact and optical disks—and a gradual increase in retrospective materials on microfilm and microfiche. Computer-assisted research can be expected to increase throughout the profession. However, the ultimate promise of totally electronic libraries is unlikely to be fulfilled in the foreseeable future.

Costs of the new information technology for practicing lawyers are high. Basic subscription rates for LEXIS and WESTLAW are beyond the reach of most small offices. Since real costs are determined by use charges, a busy office which makes regular use of these terminals will incur expenses far beyond the basic rate. Most of these costs are passed on to clients.

The wider use of "public" and shared terminals—an option neglected by the bar—could become a significant cost-saving factor.

The situation, however, is in great flux. Bancroft-Whitney/Lawyers Co-op, for example, has been marketing a system called VERALEX to solo practitioners and small law firms. For a nominal monthly fee, the subscriber can obtain access to the standard U.S. law reports as well as to LEXIS. Actual usage fees are high, however, so that the researcher must have a well-formulated idea as to what is sought if the service is to be cost-effective for a client of modest means or one whose matter does not involve a large sum of money.

The wider use of "public" and shared terminals—an option neglected by the bar—could become a significant cost-saving factor. Expanded access to such terminals requires greater initiative by local bar groups, as well as practitioner interest in their use.

Opportunities for access to legal information by the lay public throughout New England are generally inadequate. Most private law schools do not admit the general public except under special circumstances. Even the larger municipal public libraries do not keep their limited law collections up to date. Most terminals providing public access to the two major computerized legal research systems are not available for use by the lay public. Thus, only those sections of the population in convenient

proximity to a state library, or to one of the relatively few well-maintained county or court libraries or accessible law school libraries, will have adequate access for personal study or research.

Commission Findings

- Additional funding support by state legislatures is needed for state, county and court law libraries and for the acquisition of public computer terminals for legal research in those libraries.
- The organized bar, law firms and individual lawyers, and corporate law departments need to increase financial support for the law school libraries which serve them.
- Local bar groups should take the initiative to create shared terminal arrangements for access by their members to the two major computerized legal research systems.

A. How capable are the lawyers being licensed to practice law in New England today?

The historic assumption has been that new licensees will be closely supervised after admission to the bar so that they will attain competence as practitioners through "learning by doing" under the supervision of experienced mentors. That premise was valid until about 20 years ago.

The current generation of lawyers is being educated with the benefit of a comprehensive law school curriculum; improved teaching methods; and the availability of a variety of post-graduate seminars, conferences, and other programs designed to enhance the skills of the practitioner. Within this framework, the function of law school, as conceived by an educator, is to provide a sound introduction to legal principles and to help students develop sufficient conceptual ability to permit them to determine what principles are applicable to a particular factual situation.

Thus, legal education is primarily designed to impart analytical, synthesizing and problem-solving skills as opposed to the practical skills by which a lawyer applies his or her conceptual skills as a practicing attorney. Law schools do not pretend to equip all of their graduates with all of the varied practical skills necessary to advance a client's interests in a specific situation. As a result, the deans of New England's 13 accredited law schools would undoubtedly be among the first to point out that graduating law students are normally not competent to practice law alone without further training.

This situation pertains because there are many skills, such as negotiation, interviewing, cross-examination and, particularly, lawyerly judgment, which can be introduced, but not mastered, at the law school level. Time constraints, fiscal limitations and case complexities all tend to reduce the opportunity for more than a conscientious introduction to some of the practical skills which lawyers actually employ on behalf of clients.

The boards of bar examiners in the New England states do not test applicants for their proficiency as practitioners. Instead, bar examiners seek to determine whether applicants are competent to identify and resolve legal issues. They function, in essence as a check on the applicant's performance in law school.

The historic assumption has been that new licensees will be closely supervised after admission to the bar so that they will attain competence as practitioners through "learning by doing" under the supervision of experienced mentors. That premise was valid until about 20 years ago. Since then, the rapid growth in the size of law firms, the number of newly admitted lawyers and the lack of available supervisors has rendered the assumption untenable.

The Commission, accordingly, has focused on other means by which the training gap may be addressed to some extent in law school, to a more significant extent at the outset of practice, and in a continuing way during the course of a legal career.

1. Clinical Legal Education

Each of our regional law schools offers various forms of instruction in the application of law and legal knowledge. Such instruction can involve either role-playing in simulated settings or actual work with live clients. Its purpose is to introduce students to what are called practical skills—interviewing, counseling, drafting, negotiation, advocacy and so forth. This report uses the term "clinical education" to refer generically to all forms of instruction in how to apply law and legal knowledge for the practical benefit of clients.

Our research shows that the programs offered in this area by law schools vary

considerably in scope and effectiveness. On the one hand, practical training in law school based upon role-playing in simulated situations has distinct pedagogic advantages in controlling content and the principles to be derived from each exercise. On the other hand, it is very difficult to provide the average student with any in-depth understanding of the problems, including ethical concerns, which commonly arise in many aspects of practice.

The situation is complicated by the fact that clinical education is still regarded by many legal educators as being primarily the responsibility of the organized bar. As a result, apart from a first-year course in legal research and writing, law schools do not require courses in the application of legal principles for a client's practical benefit as they traditionally do mandate courses in civil procedure and certain basic areas of substantive law such as contracts and torts.

Almost all current law students have an opportunity for internships, often called "clerkships," in law offices or government agencies at some time during their law-school years. Yet this kind of employment is not integrated into the curriculum in any pedagogic sense. There are no law school-imposed requirements for the content of such clerkships, nor do law schools attempt to debrief students as to what they have learned in the field. Thus, there is nothing in legal education comparable to the two intensive "clinical years" which characterize the third and fourth years of education in a medical school.

In that connection, we note the critical importance of the so-called teaching hospitals which provide field placements for medical students. While there are no comparable "teaching law firms," many major law offices are now offering increasingly sophisticated in-house training programs for new associates. It is still not beyond question that large metropolitan firms will evolve in such a way that they come to play much the same kind of conceptual role in their profession as does the teaching hospital in its.

For the time being, debate continues as to how law schools and the bar should allocate the responsibility for clinical training between them. A survey by the Commission's research staff established that at most one student in five at a New England law school currently takes at least one course involving live-client contact. About 20 percent receive "how-to" instruction such as that offered by a trial-practice course, according to the Commission's research. There is thought to be a high degree of overlap in the students taking these two types of courses, so perhaps one third of New England law students will have had some type of supervised practical-skills instruction upon graduation.

There appears to be no serious prospect at the present time that the third year of law school will eventually be dedicated to intensive practical training or that a fourth year will be added for that purpose. Practicing lawyers are divided as to whether they would favor such a development. Legal educators oppose it.

But the trend in legal education is towards increased attention to the need for instruction in the practical application of legal doctrine. Unfortunately, all forms of practical-skills training, if done well, involve a relatively much more expensive form of instruction than does the classic Socratic teaching of legal doctrine. The latter is based upon a dialogue between a professor and a class often consisting of 50 or even 100 or more students. Many forms of practical-skills training, however, sometimes *require* a teacher-student ratio as low as 1-to-6 to achieve effective hands-on interaction.

Recruitment and compensation of an adjunct faculty made up of people who can

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teach effectively—as well as *practice* effectively—is obviously challenging and expensive. Moreover, there has been an institutional reluctance, rooted in longstanding tradition, to avoid creating an image of the law school as a highly sophisticated trade school. The classic emphasis has been upon "education" as opposed to "training," and legal educators almost uniformly resist the suggestion that law schools should evolve along the medical school model with some measure of required clinical experience prior to graduation.

Nevertheless, the "felt need" within the profession for formal clinical instruction at the law school level is very real. California, for example, appears close to imposing a requirement of clinical experience before a person can be admitted to the bar.

Accordingly, the Commission urges the New England law schools to recognize the important role they can perform as the profession tries to compensate for the collapse of post-admission *de facto* apprenticeship training. While we stop short of recommending that a substantial measure of clinical education be made a prerequisite to the grant of a J.D. degree, we urge the schools to accelerate the introduction of more forms of practical-skills training into the standard curriculum, particularly with reference to the third year.

We also urge law students to include at least one intensive skills-oriented course in their second- and third-year programs or to participate in such extracurricular activities as voluntary defenders, legal aid or advanced moot court work. The development of an extensive adjunct clinical faculty, further attention to curriculum offerings in the application of law and legal knowledge, and increased supervision of off-campus placements could eventually provide a viable substitute for, and perhaps an improvement upon, many aspects of the old mentorship system.

2. Bridging the Gap

Three of the New England states acknowledge to some extent the existence of the gap between law school studies and the attainment of practical professional skills. Vermont imposes a form of compulsory apprenticeship involving a six-month clerkship in a law office or the equivalent as a prerequisite to admission to the bar. Rhode Island has a compulsory one-week "clerkship" program. New Hampshire requires attendance at a one-day practical skills course conducted by the state bar association.

Despite its laudable objectives, the Vermont program lacks specific content and provides no standards by which to measure clerkship performance. The attorney-to-be must simply spend at least 600 hours in the office of a licensed practitioner where, presumably, pragmatic skills will be developed. There is no requirement, however, that the clerk perform specific tasks designed to develop entry-level proficiency in such basic areas as simple trials, title searches and incorporation of businesses.

The New Hampshire one-day program is just a beginning, although its objective is aptly worded: to "assist new lawyers in developing basic lawyering skills and practical knowledge." At least, there has been recognition that there is a problem, even though the response at present is minimal.

Rhode Island stands somewhere between the two. Its compulsory program is five days in length. On two days the participants view videotapes of actual civil and criminal trials. On the other days, there are lectures on practice points in the

areas of family law, title examination, probate, worker's compensation and arbitration.

For the other New England states, voluntary programs in practical skills are available to newly admitted attorneys. As we have seen, many of the large metropolitan law firms supplement such large-group offerings with their own in-house training programs. However, that kind of instruction obviously reaches only a small proportion of all new lawyers.

The Commission has concluded that there is a definite need for a formal curriculum offered on a non-profit basis to bridge the instructional gap which exists between law school and law practice with respect to practical skills training. The following two-segment model for such a transitional program has been proposed by the American Law Institute and American Bar Association's Joint Committee on Continuing Professional Education:

The Commission has concluded that there is a definite need for a formal curriculum offered on a non-profit basis to bridge the instructional gap which exists between law school and law practice with respect to practical skills training.

> The first segment consists of a course of study at least 40 hours in length, covering a core curriculum and given under the auspices of state bar examiners. The minimal goal of the first segment is to provide fundamental information for neophyte lawyers as they prepare to assume private practice responsibilities for clients.
>
> During this stage, applicants learn how to fill out forms in a set of Introduction to Practice materials and have to demonstrate their mastery of the materials to the bar examiners. Wills, divorces, collections, adoptions, corporate organization, home purchases, indigent criminal appointments and trial preparation are the focus of the first part of the course.
>
> The second segment of the curriculum requires performance training during the first two years of practice. Basic skills training integrates interactive video-discs into the instruction and testing. Achievement of the skills required is to be demonstrated either by certifying attendance at the course or by assessing student performance. The second part of the bridge-the-gap course also provides more in-depth coverage of the first segment topics and focuses upon essential techniques such as client interviewing, counseling, negotiation, advocacy and drafting.

It is apparent that the content of this prototype program goes well beyond anything required by New Hampshire, Rhode Island or Vermont at this time.

Of course, transition education of this type will have to be paid for by someone. To some extent, it might be subsidized by a state bar or statewide bar association. Students should pay most of the cost, which means that scholarships and loan programs will be necessary. If volunteer faculty can be recruited, as seems probable, a cost below $500 per segment should be feasible.

Commission Finding

- The licensing process in each of the New England states should include a compulsory course, along the ALI-ABA model, to provide a transition from theoretical understanding to the necessary skills of practice. Although there will be financial burdens involved in implementing any such effort, it is the Commission's view that the investment will be well worth the price to newly admitted lawyers, their clients and the bar generally.

3. Continuing Legal Education

During the quarter century under review, the phenomenon known as "continuing legal education" (CLE) emerged as a widely accepted complement to a lawyer's formal legal education. Typically, non-profit organizations such as bar associations or special-purpose educational institutes associated with them have provided the bulk of CLE offerings in the form of one or two-day "courses" dedicated to lectures and demonstrations in various subject areas.

Participation in CLE programs is now mandatory in more than 30 states, but remains voluntary everywhere in New England except Vermont. Providers of CLE have grown rapidly, and now include profit-making as well as non-profit organizations. By and large, law schools did not begin to sponsor such programs until the end of the period under review.

Much more can be done to develop CLE curriculum offerings which maximize the potential for the transmission of knowledge and skills in formats relevant to particular types of lawyers.

The Commission concludes that CLE has come to play an important role in the post-graduate training of lawyers. At a maximum, CLE offerings can and should strengthen a variety of legal practice skills. At a minimum, a commitment to CLE provides conscientious lawyers with the information needed to keep up to date with significant legal trends and developments.

Obviously, CLE courses vary in quality. As one Vermont lawyer stated, "CLE courses run the gamut from superb to authentically dreadful. It all depends on the administration of the program, the relevance of the subject matter, and who is chosen to teach the course."

In the view of the Commission, effective CLE must be centrally designed to offer a curriculum which provides a wide spectrum of geographically accessible, well-planned, relevant programs of interest and utility to the profession. The programs should be administered by an experienced organization. The administration should be reasonably flexible. For example, it should be possible for a small number of practitioners to obtain CLE credit by collectively viewing approved videotape presentations at a remote site. In general, the scheduling of conferences and seminars should include a choice of times and provide geographic equity.

It is difficult to say how much CLE is enough. Fifteen hours a year, or 45 hours every three years, the Commission believes, would be a reasonable standard for judging the extent of any given lawyer's commitment. That is the standard generally used in those states which require lawyers to participate in CLE programs. Vermont requires 20 hours of CLE every two years.

Compulsory CLE will not serve as a guarantee of competence. Normally, even the best CLE programs tend to involve the acquisition of knowledge rather than its application. There are obviously acceptable ways to acquire legal information other than attending CLE courses, chief of which is conducting one's own research. Nevertheless, members of the profession have an obligation to remain current, and the Commission believes it is not too much to condition annual registration upon certification that one has made a reasonable effort to do so.

A mandatory requirement should be coupled with intensive efforts by the agency which oversees adherence to that standard to make available information about those legal developments which should be familiar to someone in general practice as well as those of significance to specialists in particular fields. Much more can be done to develop CLE curriculum offerings which maximize the potential for the transmission of knowledge and skills in formats relevant to particular types of lawyers.

We recognize that mandatory CLE can theoretically be an imposition upon some highly trained specialists for whom no relevant educational programs are availa-

ble, and that it will become a burden upon the entire profession without serious and imaginative commitment to preparing appropriate curriculum offerings. Nevertheless, we believe that CLE organizations have developed substantial resources in recent years in these regards and will prove equal to the task of implementing required CLE in a meaningful way.

Commission Finding

- Participation in CLE should be mandatory for licensed lawyers in all of the New England states. Since Vermont already has a mandatory program, its experience should be considered in the shaping of programs throughout the region, as should other relevant and effective models across the country. Details based on the needs of each jurisdiction should be left to the individual states.

B. What can be done to enhance the image of lawyers?

Lawyers generally assume that their profession is held in low esteem, but a poll taken in 1989 by the University of Connecticut reports that residents of that state are generally satisfied with their own lawyers and generally view the profession positively, if not enthusiastically. Lawyers rate below clergy, teachers and doctors in public esteem, but well above real estate agents, for example. Nevertheless, within the profession there is a strong impetus to improve the image of lawyers in the eyes of the public.

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1. Pro Bono Service

Lawyers use the Latin phrase, *pro bono publico* (for the public good), to describe generically the volunteer work they do to help the broader community function and prosper. The shortened term "*pro bono*" has commonly been used by attorneys in referring to the provision of free representation to the poor. But it is also used to include such varied activities as service on bar association committees, membership on the boards of charitable organizations and participation in the work of a commission such as this one.

The ABA has recently estimated that 15 percent to 20 percent of the Bar participates in *pro bono* programs of various descriptions. A 1987 survey found that 11 percent of California lawyers take part in such efforts in that jurisdiction. In New England, the Committee for Lawyers Public Service Responsibility of the Massachusetts Bar Association has currently undertaken a classic *pro bono* project. "Countdown to 500" is an attempt to get 500 attorneys to volunteer by Jan. 1, 1990 to provide legal representation to the poor.

On another front, Massachusetts Continuing Legal Education offered four *free* continuing education programs in the *pro bono* area during May 1989, dealing with health care, consumer rights, landlord-tenant matters and child-custody issues. This initiative was based upon a recent study which showed that only about 15 percent of the civil legal needs of Massachusetts low-income residents are being met. Nationally, at least three law schools (Florida State Law School, Tulane Law School

and the University of Pennsylvania Law School) now require a minimum number of hours of *pro bono* service as a prerequisite to graduation. None of the New England law schools has such a requirement, although the concept appears to the Commission to have substantial merit.

It is impossible to quantify precisely the volume of *pro bono* services provided by lawyers outside the framework of the organized bar. The Commission believes, however, that it is fair to assume that the contribution is very substantial.

The profession also deserves generally high marks for providing funding for legal services to the poor. In Massachusetts, for example, a surcharge on filings in civil cases has been earmarked for funding legal services for the disadvantaged.

The concept of a mandatory pro bono *program is theoretically attractive, and has been endorsed by a narrow majority of the Commissioners.*

Throughout the region "IOLTA" programs (Interest on Lawyer Trust Accounts) have been instituted to divert the interest earned on lawyers' short-term trust and client accounts to help fund legal service programs. In keeping with a national trend participation is compulsory in Connecticut and will be next year in Massachusetts and Vermont. The rate of return is, of course, much higher in the compulsory jurisdictions. The Commission favors making the program mandatory since the bookkeeping burden falls primarily upon depository banks which are in a position to absorb such costs as a reward for increased deposits.

In Vermont, at the express urging of Chief Justice Frederic Allen, lawyers have volunteered in considerable numbers to offer uncompensated service in civil and criminal matters. Debate continues within the profession as to whether *all* lawyers ought to devote *some* time each year to pure *pro bono* work representing not-for-pay clients. The ABA House of Delegates initially had voted against requiring lawyers to devote a fixed percentage of their time to *pro bono* activities. The prevailing argument was that a lawyer should be free to meet his or her public service obligation by donating money, rather than time, to legal service organizations which, in turn, hire staff lawyers to represent the poor However, in August 1988 the House of Delegates passed a resolution "recommending" that each lawyer donate 50 hours a year to uncompensated professional work for the public good.

In July, 1989 the New York State Bar Association proposed a mandatory *pro bono* requirement of 20 hours a year. None of the New England states has yet to address this issue.

The concept of a mandatory *pro bono* program is theoretically attractive, and has been endorsed by a narrow majority of the Commissioners. Presumably a central clearinghouse would receive applications and make assignments; attorneys and firms would have fixed quotas of *pro bono* cases and time. Quotas would be based on the level of demand by those eligible to receive *pro bono* assistance.

The majority's proposal would mandate *pro bono* service in connection with transition education. Through representation of the needy and the aged, practical-skills training could simultaneously be achieved. *It would be essential, of course, to provide highly qualified supervisors to ensure a satisfactory level of services and to provide a genuine learning experience for the new lawyers.* A reasonable program might require 100 hours of service over a five-year period.

On the other hand, many individuals and firms may currently devote more time voluntarily to *pro bono* activity than they would if a mandatory system were adopted. There is widespread concern that a compulsory program would stifle the current spontaneous, but largely invisible, generosity of many lawyers. A quota would tend to become a maximum. Additional bureaucracy would certainly be created. Services provided grudgingly might often be of mediocre quality.

There are no easy answers, but most of the Commissioners agree that, at a minimum, public dialogue on the subject is needed. The license to practice law carries certain obligations with it. Defining those obligations to the disadvantaged and determining how they may be equitably discharged by the bar is a timely matter of legitimate interest to the public at large in New England.

Commission Findings

- Lawyers as a whole contribute significantly to the protection of the poor and elderly, to the promotion of charitable causes, and to the discharge of governmental functions. Most of this work is done without compensation.

- The organized bar also does its share; through such representative efforts as "Countdown to 500" and "MCLE *pro bono* Month" in Massachusetts. Vermont's Chief Justice has currently enlisted large numbers of volunteers to meet the need for *pro bono* representation in that jurisdiction. In each New England state, IOLTA programs divert interest earned on lawyers' short-term trust and client accounts to fund legal service programs. These programs might well be made mandatory, as in Connecticut, to ensure uniform participation and increase revenues.

- Mandatory *pro bono* service should be included as an element of compulsory transition education. A public debate as to what is each lawyer's "fair share" and how to discharge that obligation is in order. This dialogue will focus attention on how much needs to be done and on who is to do it.

We find evidence to suggest that many entering law students lack an adequate sense of the regimen of legal education.

2. Pre-Law Studies

In many ways, the hope of the profession lies in the caliber of the college graduates who enroll in law school. What causes a college student to contemplate a career in the law? Such an inclination may stem from the attitudes of a parent, family member or friend engaged in the profession or from a variety of other sources. Interestingly enough, college graduates are now deferring enrollment in law school to the extent that more than half of all first-year law school registrants do not come directly from college, but have had a year or more of graduate school or work experience.

We find evidence to suggest that many entering law students lack an adequate sense of the regimen of legal education. Most of the liberal arts colleges which send their graduates on to law school offer one or two courses in constitutional law which are taught from the perspective of political science. Over 50 percent of all first-year law students are graduates of between 300 and 400 of the roughly 3,200 colleges and universities which grant bachelor degrees in this country. These core institutions generally do not try to offer any formal "pre-law" curriculum, nor do the law schools encourage them to do so. To this point, the law schools have

recommended nothing more than a strong liberal arts background for entering students.

The Commission concludes that there is a serious gap between the knowledge acquired through a good course in civics and a basic understanding of the legal system which might usefully precede the formal study of law. Most non-lawyer college graduates do not appear to know the fundamental tenets of adversarial justice nor to comprehend the functions which lawyers actually perform in our society. Thus, a rigorous introduction to the adversarial system at the college level would be beneficial for any college student, not just one interested in attending law school.

Law and lawyers are playing an increasingly central role in American life. It is important that both those entering law school as well as those who will have to deal with lawyers while pursuing other careers understand in some depth what the basic premises of our judicial system are.

In the Commission's opinion, organizations such as the ABA, the American Bar Foundation and the Association of American Law Schools might assist in the development of two model courses for college juniors and seniors.

The first course would be substantive in content. It would explain the relative function of trial and appellate courts; explore some of the basic assumptions of an adversarial system; introduce such fundamental Common Law concepts as the reasonable man, proximate cause, burden of proof, and so forth; expose students to some of the jurisdictional and choice-of-law subtleties of federalism from a lawyer's point of view; and delineate some bridges between law and other key disciplines such as economics and medicine. The purpose would be to permit the student, pre-law or generalist, to understand the fundamental role of law in our society and its pervasive effect upon the way educated people conduct their personal and "business" lives.

The second course would seek to provide prospective law students with an understanding of how lawyers function in our society, including the various roles lawyers play and their ethical responsibilities to their clients, the legal system and society at large. It would focus upon the lawyer's unique and delicate role in zealously furthering a client's legitimate interests, while ultimately helping to accommodate those interests to the conflicting and equally legitimate interests of others, all within the confines of the attorney's overriding obligations to society as an officer of the court. Leaders of the bench and the bar could be recruited by the course instructor to provide insight into these matters from the perspective of lawyers working in a variety of settings such as private practice, criminal prosecution, administrative agencies, legal services offices, corporate law offices, non-profit organizations and the judiciary.

We recognize that many liberal arts colleges try to avoid such pre-professional courses as a matter of principle. There are sound educational reasons for that position, but such colleges might want to mount a series of lectures or panel discussions given by local attorneys, judges and others which could cover the same subjects recommended for the two model courses.

Law and lawyers are playing an increasingly central role in American life. It is important that both those entering law school as well as those who will have to deal with lawyers while pursuing other careers understand in some depth what the basic premises of our judicial system are and what an adversarial approach can and cannot do to protect or further basic societal values. Law and lawyering cannot solve every problem, and college graduates can profit from an understanding as to what some of the basic limits of organized "justice" are.

Commission Findings

- The development of a formal pre-law curriculum has not been encouraged by the law schools. Given the increasing complexity of our society and the critical function which the adversarial system plays in accommodating conflicting interests, prototype pre-law courses should be developed to introduce college students to the role of law in our society, the varied work of lawyers and the nature and philosophy of lawyering in a Common Law jurisdiction. In this manner, the Commission believes that the profession can attract law school students who have a better understanding as to what the life of a lawyer will be like and what society will expect of them by way of moral values and public service commitment.

- The Commission further believes that for those not interested in a legal career *per se*, the formulation of such courses would provide an opportunity to understand the basic premises by which the legal system operates. It is important to an informed citizenry that there be rigorous courses available at the college level which explore in some depth how law impacts all of us.

We turn next to a consideration of a number of critical issues in the administration of civil justice which New England faces in the final decade of the 20th Century. In each instance, the position set forth in the text which follows represents the consensus view of a clear majority of the Commissioners.

A. Do we have too many lawyers?

Having in mind the dramatic increase in the size of the profession, it is fair to ask whether we now have too many lawyers for the good of the economy as a whole. The following table records the growth in the profession on a national scale during the 25-year period under review:

Year	Number of Lawyers	Ratio of Lawyers to Population
1960	286,000	1/632
1970	355,000	1/572
1980	542,000	1/418
1985	655,000	1/360

Because the region today has a record number of lawyers does not necessarily mean it has a surplus for an expanding economy and an increasingly complex society.

Today there are approximately 725,000 lawyers in America. This number is at a historic high, both in absolute terms and relative to population. The same is true for New England, which has nearly 50,000 active lawyers, over half of whom are located in Massachusetts.

Because the region today has a record number of lawyers does not necessarily mean it has a surplus for an expanding economy and an increasingly complex society. If nothing else, lawyers are needed in great numbers to service the regional economy. Legal counsel have to play an increasingly important role in the multifaceted complexities of modern commerce. Lawyers are in a unique position to render services which can increase the likelihood of a reasonably efficient transfer of goods and services within the region, across the nation and throughout the world.

Currently, some 30 percent of all licensed lawyers are not engaged in private practice. But we should not misinterpret that fact, which effectively held true throughout the quarter of a century under review. Most lawyers who are not engaged in private practice have been readily absorbed by the public sector and corporate law departments. Although attorneys working in those areas have only a single client, they are practicing lawyers so far as their professional obligations are concerned.

Moreover, the economic and social relevance of a law degree extends well beyond the literal practice of law. Many corporate executives, government officials, consultants, social service providers and other administrators make daily use of the analytical skills and legal principles they learned in law school. Indeed, those trained in the law fit easily into a host of occupations where they often are highly successful.

In the world's most free and open society, an increasing number of lawyers is required to keep pace with the needs of an expanding population, massive economic growth, and the evolution of societal relationships in the post-industrial era. For example, just the volume of new laws and regulations passed in the 1960s and 1970s, resulting from the emergence of civil rights, women's rights, consumer

protection and the environmental movement increased the need for legal services significantly.

Our investigation established that the national job market has readily absorbed the available trained legal personnel in law-related employment and is calling for even more. The specific evidence on this count is as follows:

1. As the economy grew after 1960, the increase in the number of private practitioners more than kept pace with that growth. Gross National Product grew by 117 percent in constant dollars between 1960 and 1985, whereas the number of lawyers in private practice increased by 121 percent during the same period.
2. Corporate and government law departments have mushroomed in absolute numbers over the past 25 years. Of the 30 percent of licensed lawyers not engaged in private practice, almost all are working in one of these other areas.
3. Notwithstanding the growth to date, a strong demand for legal services by government, business and individuals has been projected by the U.S. Department of Labor's Bureau of Labor Statistics to continue through the year 2000 at least. (To this point, the accelerating demand for legal services has occurred in the fields of litigation, new business formation and expansion, corporate mergers and acquisitions, international trade and finance, family law and tax law.) Employment in the legal services field is expected to increase by 3.8 percent annually, ranking it among the top 10 fastest growing industries overall. Paralegal workers, the emerging support arm of the legal profession, are expected to be the fastest growing of all occupations with a growth rate of over 100 percent.
4. Certain communities in New England—ranging from Middlebury, Vermont to Portland, Maine to Boston, Massachusetts—do have a significantly disproportionate number of lawyers to population compared with the norm. (Middlebury has a lawyer-population ratio of 1-135, whereas Vermont as a whole has a ratio of 1-571. In Portland, the ratio is 1-67 compared with the statewide average of 1-457. For Boston, the ratio is on the order of 1-50 as compared with the Massachusetts average of 1-262.) These percentages only establish, however, that there are legal centers in New England rather than that some areas have a surplus of lawyers *per se*.

Our investigation established that the national job market has readily absorbed the available trained legal personnel in law-related employment and is calling for even more.

Until we have met the legitimate legal needs of the poor, the disadvantaged and the middle class, we cannot say there are too many lawyers. The problem of compensating lawyers who serve those constituencies must be viewed apart from whether we are training too many members of the bar.

Commission Findings

- Contrary to popular concern, there is no convincing evidence of a lawyer "glut" in New England. Although the ratio of lawyers per capita fluctuates widely throughout New England, it appears that the region as a whole has been absorbing and making good use of its law school graduates.
- The U.S. Department of Labor predicts that a strong demand for lawyers will con-

tinue in the next decade, and projects that paralegals will be one of the fastest growing occupations during the remaining years of the 20th century. The New England outlook for legal employment seems equally bright.

B Are legal fees excessive?

There is possibly a relationship between the substantial increase in the number of lawyers and the persistent complaints of excessive fees and undue litigiousness which plague the profession. In and of themselves, such complaints are consistent with "over-lawyering," or the devotion of undue attention to a legal matter in the light of the value, importance or complexity of the issue at stake.

Fundamentally, however, the level of fees should always reflect the value a competitive marketplace willingly places on various kinds of legal services in a knowledge-driven economy.

Over-lawyering has many sources. Sometimes it can occur when a lawyer lacks enough to do or exaggerates malpractice concerns or simply is in a position to bill a client for work which is not absolutely necessary, such as excessive legal research.* In such cases, overcharging is the net effect upon the client. Because of a possible correlation between excess capacity and excessive fees, the Commission considered what evidence there is that legal fees are, in fact, excessive on any kind of a pervasive basis in this region.

We started with the knowledge that lawyering has historically been one of America's highest-paying *professions,* and, for a relative few, it can be one of its highest paying *occupations.* Lawyers certainly are entitled to charge rates which reflect their extensive educational background, the time taken to become current in a particular field and the skills in negotiation, drafting and advocacy developed through experience. As law has become more complex, so has its practice come to demand a higher level of skills which can be quite properly reflected in fees. Fundamentally, however, the level of fees should always reflect the value a competitive marketplace willingly places on various kinds of legal services in a knowledge-driven economy.

Normal market forces, however, could be distorted by the fact that the legal profession does enjoy a form of monopoly, since only licensed lawyers may practice law. While it would seem that the very existence of the dramatic growth in the number of lawyers over the last 25 years would have been sufficient to ensure vigorous price competition, nevertheless, continuing allegations of excessive fees must be evaluated in terms of whether they reflect misuse of the self-regulated monopoly power conferred upon the profession as a whole.

There is no doubt that lawyers are generally well-paid for their services. According to an *American Lawyer* magazine survey, some partners in the 15 largest law firms in the United States are making on the order of $750,000 a year. By contrast, the ABA projects a "national average" of $62,500, which it believes to be reasonably accurate. The median income for a lawyer in 1987 was estimated to be $67,000.

*There are other possible causes, of course. For example, lawyers can display an almost fixated need to be overly precise or to plan in great detail for highly remote contingencies. That kind of over-lawyering is an occupational hazard rather than a function of excess capacity.

Another reliable estimation of legal income can probably be derived from the fact that the nation's approximately 460,000 lawyers who were engaged in private practice in 1985 generated *revenues* of $55 billion that year. That would mean gross receipts per lawyer in that year on the order of $120,000. Allowing for overhead of 40 percent, average *earnings* would have been on the order of $72,000 per lawyer.

For the period 1986-1988, it is the Commission's sense that $60,000 to $75,000 is a thoroughly realistic estimate of the *average* annual income of a lawyer in full-time private practice in this region. That estimate is consistent with the ABA's projected national average. One would expect New England lawyers as a whole to exceed the national average since the region itself is relatively more prosperous than the nation.

The public deserves more information about the standard by which all lawyers can be held accountable for their charges to a client.

Another ABA survey showed that the average new law firm associate earned $33,000 in 1987, up 20 percent from the previous year. However, the average figure conceals major differences in starting salaries, depending on firm size and location. For example, among the most competitive New York corporate firms with a national practice, starting salaries will exceed $80,000 this year. But in 1987, the average small firm started its associates at only $26,000. New associates at firms of more than 10 lawyers averaged $42,000 that year, according to the *ABA Journal's* Law Poll.

As we have noted earlier, nearly a third of all lawyers do not practice privately, but are paid salaries by government or industry. About two in three of those who work in private practice are sole practitioners or practice in firms of five or fewer attorneys. Many lawyers practice law part-time, and, on the average, were probably deriving $30,000 or less from their profession as of 1987.

Hourly billing rates for the 10-year period 1975-1985 do not reflect the atypical, upper-range fees sometimes reported in the press. According to Cantor & Co., a Philadelphia consulting firm, the Consumer Price Index rose 103 percent during the period surveyed, hourly rates for all partners on a national basis stayed abreast, rates for associates lagged behind and rates for legal assistants trailed even more significantly, as the following chart demonstrates:

HOURLY BILLING RATES

	1975	1985	Percent Change	CPI Change
Senior partner	$70	$141	101	103
Senior associate	$50	$ 90	80	103
Legal assistant, other professional	$25	$ 41	64	103

For the period surveyed, Cantor & Co. found that expenses increased faster than both receipts and profits per lawyer. That finding seems wholly inconsistent with any possible abuse of the profession's quasi-monopoly position, as does the fact that legal fees have roughly tracked inflation.

We are concerned that some urban law firms under intense pressure to meet high overhead costs impose billable-hour quotas on their associates. The Commission has concluded that this pressure has resulted in some lawyers in some firms meeting their billing objectives by spending additional time on a given matter without qualitatively improving the work product in question. While billing practices are increasingly monitored by insurance companies and other large clients,

the risk of overbilling represents a fact of life inasmuch as lawyers themselves decide how much of their time is to be regarded as billable.

This Commission finds that current fee levels in both rural and urban areas continue to place the cost of good legal services beyond the reach of many New Englanders.

Contingent Fees

Contingent fees can range anywhere from 20 percent to 50 percent of a client's recovery depending upon the circumstances of individual cases. Most commonly, these fees are set at 33 percent. Out-of-pocket expenses are also borne by the client. In contingent fee situations, there are surely some instances in which some attorneys are compensated well beyond the reasonable value of the time and effort they have invested. The Commission is aware of no economic study of the relationship of contingent fees to services performed, but believes such a study would be helpful.

The public deserves more information about the standard by which all lawyers can be held accountable for their charges to a client. The basic principle is that a lawyer must always charge a "fair fee under the circumstances." For law firms which bill on the basis of hourly rates, the overall fee must still be "reasonable" in order to satisfy the unequivocal stricture of the Canons of Professional Responsibility. Thus, even a firm which keeps detailed time records and bills on an hourly basis must still limit its fee to the reasonable value of the useful work actually performed.

Even where the fee is contingent, it must still be a "fair fee under the circumstances." For example, the form of contingent fee agreement authorized by the Supreme Judicial Court of Massachusetts provides as follows:

> (4) Reasonable compensation on the foregoing contingency is to be paid by the client to the attorney but such compensation is not to exceed the following maximum percentages of the gross (net) [indicate which] amount collected.

Seemingly, each fee must be reasonable with respect to the particular case in which it arises. Averaging fees over several cases appears to be improper.

Because legal fees are essentially self-regulated by the lawyers concerned, overbilling undoubtedly does occur from time to time. While the Commission did not find evidence of any endemic problem in this area, it urges, as a safeguard, that more publicity be given to the overriding requirement that every fee, however computed, must be reasonable. In addition, the supreme courts in our region have ample jurisdiction to investigate at any time the fees being charged by the lawyers whom they have licensed.

Barbara Curran's 1977 landmark study, "The Legal Needs of the Public," concluded that middle-income Americans, who comprise some 70 percent of the U.S. population, are not being served adequately by the legal profession. This Commission finds that current fee levels in both rural and urban areas continue to place the cost of good legal services beyond the reach of many New Englanders. The next section of this Report addresses, therefore, what can be done about that situation.

Commission Findings

- Legal fees, although frequently high, have roughly tracked inflation. In addition, there

is solid evidence that expenses are outstripping lawyers' gross receipts and reducing net profits.

- Despite the very large fees paid to some prestigious lawyers and law firms, the Commission finds no convincing evidence that the profession has been abusing its monopoly position. A fair estimate of the average compensation for a New England lawyer at the present time is in the range of $60,000 to $75,000 annually.
- Some urban law firms under pressure to meet high overhead costs impose billable hour quotas for their associates which tend to inflate billings for certain clients without qualitatively improving the work product.
- Undoubtedly, contingent fee compensation is sometimes out of line with the value of the services rendered, but there is no study available which enables us to correlate contingent compensation with hours of service performed. It would be useful to have one.
- The cost of legal services, particularly for middle income families, both urban and rural, is also a source of legitimate concern.
- The profession needs to promote public awareness that all legal fees, whether set on an hourly or a contingent basis, are subject to the standard of reasonableness set forth in the Code of Professional Responsibility and the Rules of Professional Conduct.

Access to sophisticated legal services is increasingly essential to more and more citizens in a knowledge-intensive society. The cost of these services has become a matter of significant concern for most clients and potential clients.

C. What can be done to reduce legal costs?

Access to sophisticated legal services is increasingly essential to more and more citizens in a knowledge-intensive society. The cost of these services has become a matter of significant concern for most clients and potential clients.

The Commission considered six methods of containing legal costs: group legal insurance, information technology, lawyer-referral services, alternatives to litigation, paraprofessional assistance and expansion of small-claims jurisdiction. Of these, the development and expansion of group legal plans seems to have the most significant potential for permitting lawyers to serve larger numbers of people at more affordable rates.

1. Group Legal Insurance

Group insurance has the potential to meet the needs of lower and middle-income Americans who otherwise cannot afford legal services at today's prevailing rates. Although relatively few of our citizens currently enjoy coverage under the existing plans, and although that coverage is fairly circumscribed, group legal insur-

ance is still expanding at a significant rate.

Nationally, 5.5 million people were covered by group plans in 1981. Today, an estimated 15 million people, representing 12 percent of the workforce, are covered by prepaid legal insurance, according to the National Resource Center for Consumers of Legal Services. About 6 million employees are covered under employer-paid plans. The rest pay for protection individually or through union dues. A typical plan might cost $12 a month for basic legal services. There are added charges for more involved legal work, but those specialized services are often performed at a reduced rate.

The proliferation of group insurance suggests that the cost of meeting basic legal needs may become more manageable if the cost can be spread over a large population.

For example, PepsiCo recently adopted a prepaid legal services plan for its 48,500 employees and their families.* One of the largest of several hundred companies that have funded or are in the process of funding such programs, PepsiCo offers the plan as one of a variety of employee benefits. For an annual fee of $140 per employee, an independent contractor provides advice, consultation, and the preparation of documents such as wills, deeds and mortgages. Approximately 30 providers offer prepaid legal plans either through employers or directly to individuals. Two of the best known of these firms are Hyatt Legal Services and Jacoby & Myers.

The organized bar had been skeptical that competent legal work could be performed at the rates which group plan sponsors offer to participating attorneys. But a 1986 poll by the *ABA Journal* found that two-thirds of the lawyers surveyed approved of prepaid legal insurance. Those least supportive and unwilling to participate in group plans were the lawyers whose clients need group plans the least; namely, high-income lawyers in large firms.

Three years ago, the ABA founded, and continues to support, the American Prepaid Legal Insurance Institute. The ABA also has a Special Committee on Prepaid Legal Services. One of its missions is "to assist state and local bar associations in removing regulatory and other barriers to the development of these plans in various states and jurisdictions," according to former ABA President William F. Falsgraf.

In 1988, Chase Manhattan Bank began to offer legal service plans to the holders of its credit cards. The proliferation of group insurance suggests that the cost of meeting basic legal needs may become more manageable if the cost can be spread over a large population.

Group legal insurance is virtually unknown in the three northern states of New England and has been only moderately used in Massachusetts and Connecticut. However, Rhode Island has been something of a pioneer in the provision of group plans.

Midwest Legal Services underwrites and administers a program offered by the Prepaid Legal Service Corporation of Rhode Island. The sponsor corporation was set up by the state bar, and currently provides coverage for some 3,500 participants.

Blue Cross and Blue Shield of Rhode Island covers an additional 3,500 subscribers with a competing legal insurance program modeled after its group health insurance program. Called Legal Care, this program does not appear to be receiving the kind of marketing support its medical siblings do.

*Other national companies offering such a plan to its employees include American Express, General Motors and Navistar International Corp.

Commission Finding

- Group legal insurance is still in a developmental phase. Determination on the part of the organized bar—as in Rhode Island—to find ways and means to expand this kind of coverage would provide a genuine opportunity to extend legal services to millions of Americans whose need for services at reasonable cost is very real. The ABA appears to have made a major commitment to the development of these plans on a wide scale. The New England bar associations would do well to follow suit.

Lawyers generally, including those in New England, have yet to take full advantage of the new technologies for legal research.

2. Information Technology

Various information technologies undoubtedly result in a speedier, larger volume of paper output per lawyer. It has not been demonstrated that this process results in savings for the client. Indeed, the output of these devices is frequently separately billed to the client, thereby tending to increase overall charges.

Most of a lawyer's time is necessarily devoted to giving individualized attention to each client's objectives, a process which frequently results in the production of a decidedly particularized work product. To date, no one has found a way to obtain for legal services the economies of scale seemingly being achieved in medicine through health maintenance organizations. The new information technology should not be seen as providing a potential breakthrough. Individualized solutions to particular problems are still the order of the day in legal practice.

Computerized search systems have succeeded somewhat in improving the effectiveness of legal research, but at a very high cost. The expense is often passed along directly to the client as a separately stated "disbursement" item.

Lawyers generally, including those in New England, have yet to take full advantage of the new technologies for legal research. Evidence indicates that available computerized research programs are often underutilized and employed inefficiently when they are used. Over time, an increase in the number of computer-literate law school graduates, the emergence of computer research legal specialists and the development of less costly systems may eventually increase the cost-efficient use of computerized systems.

Commission Finding

- Preliminary research indicates that, in this early stage of development at least, the new technologies available to lawyers are probably more effective in producing more paperwork, at a faster pace, than they are in reducing costs. There is little evidence that any wholesale savings to clients has resulted to date. Indeed, since the costs of computerized research are generally charged as "extras," the new information technology may actually increase legal expenses instead of reducing them.

3. Lawyer-Referral Services

Seventeen city and county bar associations in New England maintain lawyer-referral services. The Boston Bar Association, for example, processes up to 12,000 requests a year for referrals to lawyers. For those who do not qualify for legal assistance, there is a special panel of lawyers available who are willing to perform services for $25 an hour. The lawyer determines whether the client is eligible.

Clients of modest means funneled through a lawyer-referral program are probably less at risk of being overcharged than are clients generally.

Bar associations understandably eschew supervision of the participating lawyers once a referral has occurred. Recommended rates for various types of routine legal work for those who do not fall within the guidelines have proven to give rise to antitrust problems. Nevertheless, clients of modest means funneled through a lawyer-referral program are probably less at risk of being overcharged than are clients generally. The Commission recommends intensive advertising of the availability of lower-fee panels for those clients with limited means.

4. Alternatives to Litigation

It has been suggested that increased use of alternative forms of dispute resolution (so-called ADR) as substitutes for conventional litigation would greatly reduce legal costs. ADR is basically not a new concept, since it is rooted in negotiation, arbitration and mediation. Nevertheless, the search for methods to avoid litigation has gained significant momentum over the past decade. The ABA estimates that 50 percent of all ADR programs currently in use date from 1980, and nearly 25 percent from 1985.

ADR's potential can be seen in the fact that 90 percent of all filed lawsuits eventually are settled. ADR seeks to accelerate that process.

Court-mandated, but non-binding, arbitration and mediation is used throughout New England. In Maine, for example, arbitration is compulsory in all divorce cases where there is any dispute concerning the status of a minor child. Maine law also provides for voluntary mediation in any civil matter, and certified mediators are available on a statewide basis. In Vermont, voluntary mediation is used in cases of family disputes and in small-claims matters.

In June 1989 Rhode Island imposed a compulsory non-binding arbitration procedure for most civil actions involving less than $50,000 in an effort to reduce the growing civil trial backlog in the Superior Court. Under the program, a single lawyer, who serves as an arbitrator at a cost of $300 paid by the parties, will typically conduct a four-hour hearing and render a decision within 10 days. At that point, either party has 10 days to claim a trial *de novo* in Superior Court.

Typical of successful ADR initiatives is a program sponsored by the Boston Bar Association which provides experienced volunteers to serve as unpaid mediators for federal cases without cost to the parties.

Typical of successful ADR initiatives is a program sponsored by the Boston Bar Association which provides experienced volunteers to serve as unpaid mediators for federal cases without cost to the parties. Referral to a Boston Bar Association mediation panel can be compelled by a district judge, although the panel's decision is non-binding and without any precedential effect.

The federal district courts in this region are also experimenting with a practice known as the "minitrial." Contending parties present open and closing arguments to a "jury" drawn from the regular jury pool. The mock jury deliberates and renders a non-binding "verdict." The parties then have an objective basis upon which to discuss settlement.

ADR users report greater satisfaction with the process than do courtroom litigants. In one study, 94 percent of those who mediated their dispute felt they had

been able to "tell their story," while only 65 percent of those who chose litigation felt that way.

The basic weakness of existing alternatives to litigation is that they are voluntary and so normally require mutual agreement to implement. Binding arbitration cannot be mandated by statute or judicial order in many situations because of constitutional limitations. Studies show that voluntary ADR has not been used often enough to have a material impact on litigation costs.

With greater legislative and judicial initiative, it is possible that much can be done to implement cost-effective reforms. For example, law students can be given more exposure to ADR. Exhaustion of one or more non-binding ADR methods could be made a prerequisite to access to the courts in a variety of situations.

Commission Finding

- The adversary system of justice is deeply entrenched. Litigants seek their day in court. Progress in attracting disputes to alternative forums will be slow. Nevertheless, the concept of ADR deserves wide support, and "consciousness-raising" initiatives should be taken wherever possible.

5. Paraprofessionals

The Department of Labor forecasts that these so-called paralegals will comprise the fastest growing occupation in this country through the year 2000.

Over the 25 years under review, there has been a decided trend towards the delegation to non-lawyer staff assistants of specialized tasks which do not require legal analysis and judgment. The Department of Labor forecasts that these so-called paralegals will comprise the fastest growing occupation in this country through the year 2000. Many New England colleges have established formal paralegal training programs in a number of fields of law where much of the legal work is often sufficiently routine and repetitive that it does not require a law degree to perform it well.

Generally speaking, paralegals are trained to perform functions above the level expected from an experienced legal secretary, but below that which is expected of a starting attorney. Paralegals can be very effective in such areas as litigation, real estate and probate. With limited supervision, they can perform a variety of quite complex tasks in such matters. As a result, attorneys are freed to take on more work or address more demanding aspects of their practice. Moreover, paralegal services are billed at considerably lower hourly rates to clients.

It is doubtful, however, that significant economies have yet ensued for many clients. Most lawyers base their fees upon an hourly rate which includes the use of office equipment and routine support personnel like secretaries as well as the value of the lawyer's own time. Paralegal time is normally billed separately from this rate. It can be argued that sometimes work which had been included within the "rate" before the advent of paralegals has simply been "unbundled" and added to the client's cost.

Since paralegals are expected to grow rapidly in numbers . the coming decade, their overall cost-effectiveness will soon become much more apparent. In any event, there is clearly a responsible place within the profession for highly trained non-lawyers, and at a minimum increasing use of paralegals will have potential to con-

tain the cost of legal services in many situations.

It will be interesting to see how paralegals evolve as a subculture of the legal community. Will they be caught in a nether world between secretaries and lawyers, sometimes doing the work of one, sometimes of the other? Or will they emerge, like nurses, as a clearly defined group with recognized lines of authority? It is really too early to tell.

Commission Finding

- Paralegals, if billed reasonably and supervised diligently, have the potential, in the Commission's judgment, to help contain costs, if not reduce them. The projections for very significant growth in the number of paralegals would seem to present a major opportunity to test that potential over the coming decade.

6. Small Claims Reform

The municipal and other district courts throughout the region all enjoy so-called "small claims" jurisdiction. In Massachusetts and Vermont, for example, the prerequisite for 69 such actions is that a claim have a value, or be reduced to a value, of $1,500 or less. The entire claim procedure can be handled with the assistance of court personnel without an attorney. In fact, the use of lawyers is discouraged. The trial is before a judge.

Were the jurisdictional limit in all six New England states to be increased to a ceiling such as $5,000 per claim, a significant range of cases could be heard speedily in these forums. The Commission believes that this "fast track" informal adjudicative system has the potential to expedite disposition of a wide variety of civil matters at little cost to litigants.

The effectiveness of such a major change in small claims jurisdiction would depend upon the quality, and the availability, of the judges assigned to handle these matters, and the decisiveness with which they carried out their task. State legislatures must be prepared to add judges where necessary to handle the increased workloads which should follow this kind of reform. Given sufficient judges dedicated to making this informal adjudicative procedure work, many cases could be resolved within minutes, most within hours. Few would consume half a day or more.

Commission Finding

- Expansion of small-claims jurisdiction will make effective justice in low-level disputes available to many more people without associated legal fees. Consideration should be given to raising the jurisdictional limit to $5,000 throughout the region.

D. How well is the civil justice system working?

We turn next to a consideration of how well the civil legal system is working.

Recent public debate would suggest that we are experiencing a kind of crisis in civil litigation.

To begin with, there is the disconcerting finding of the Rand Corporation's Institute for Civil Justice that over one half of all plaintiffs' recoveries in personal-injury cases are used to satisfy lawyers' fees and litigating costs rather tha to compensate the injured parties. Our adversarial tort litigation system is said to cost the national economy an estimated $29 billion to $36 billion annually. If less than half of that amount compensates the injured parties, one must question the efficiency and fundamental fairness of the system.*

It is also said that an inordinate number of lawsuits are being filed, that there is undue delay in resolving them, and that the costs of litigating them are prohibitive. Typical of this kind of concern was a news story in *The Boston Globe* on April 13, 1989 headlined "Judges, Lawyers Fear Courts Reaching Gridlock." The article pointed out the extent to which the disposition of civil cases in both the state and federal courts in Massachusetts has become stalled for lack of judicial personnel.

The primary benefit of the contingent fee system is that it allows claimants who could not otherwise afford to pursue litigation to obtain satisfactory compensation for genuine personal injuries with the assistance of skilled counsel.

1. Pros and Cons of Contingent Fees

The primary benefit of the contingent fee system is that it allows claimants who could not otherwise afford to pursue litigation to obtain satisfactory compensation for genuine personal injuries with the assistance of skilled counsel. The lawyer is given a significant inducement to take a calculated risk that the client will obtain a sufficient recovery to justify the legal services required.

The primary detriments of the system are that it can sometimes encourage the pursuit of marginal claims by lawyers who have no competing work demands, and it can also result with some frequency in the payment of legal fees out of proportion to the value of services rendered in an open-and-shut case.

Since the essence of the contingent fee arrangement is a provision that the attorney will be compensated for legal services if, but only if, the client prevails by way of a settlement or judgment, the lawyer becomes an entrepreneur who bears the risk of the undertaking, and who shares in the fruits if there are any. Since the lawyer is entitled to advance the costs of litigation if the client cannot afford to pay them, the financial involvement on the part of counsel, especially in cases requiring extensive expert testimony, such as medical malpractice matters, sometimes becomes very substantial. If there is no recovery, many lawyers will not seek repayment of costs. If they do, many clients lack the means to reimburse counsel for the advances. Thus, clients are frequently held harmless as a practical matter from the consequences of unsuccessful contingent fee litigation.

Despite some potential for abuse, the contingent fee has proved to be an effective device to obtain full damages for injured persons not otherwise precluded by Worker's Compensation. Contingent fees are also commonly negotiated for debt collections. Again, in some situations, there is a prospect of some excessive compensation since debts are often settled following receipt of a "lawyer's letter" threatening suit. However, on balance, many debts are partially collected which otherwise would be written off as uncollectible.

**In 1986, Connecticut addressed this problem by enacting a statute which scales contingent fees to the amount recovered. Thus, for any recovery above $1.2 million, the maximum fee is 10 percent.*

Public awareness of the contingent fee aspect of the so-called "crisis" has been increased by the media attention lavished on devastating injuries which produce multimillion dollar damage awards. Also capturing public attention are positioning statements published by insurance companies, public interest groups and the like, decrying the costs and inequities of the present process.

Case filings in federal district courts have risen fourfold from 19 per 100,000 population in 1900 to 80 per 100,000 in 1980.

As a result, 91 percent of Americans polled by Louis Harris & Associates in 1987 said they felt that our tort liability system needs to be changed, and 48 percent said they believed the changes should be substantial. More than half of those surveyed said they believed that their fellow citizens sued more often than they ought to and that the growth of damage awards exceeded inflation.

These public perceptions—some of them doubtless shared by legislators—eventually resulted in generalized pressure to "do something." State legislators, bar organizations, insurance companies and consumer protection groups have all participated in a search for corrective measures. Between 1986 and 1988, at least 66 pieces of tort reform legislation were passed by various state legislatures, including five of the six in New England.

Part of the problem lies in the very nature of the legal system itself. Justice is meted out on a case-by-case basis, so that a court or jury awards a level of compensation that seems "fair" under a particular set of circumstances. However, individual personal-injury judgments then have a significant cumulative effect on the overall cost of insurance coverage within the economy. An insured company which has a favorable claims record, for example, is forced to pay a base rate set for its industry as a whole. Thus, an orthopedic surgeon without any adverse claims history in the Boston area pays over $100,000 in *annual* malpractice insurance premiums.

There is a real, but unresolved, need in the civil liability field to understand better the true capacity of the insurance industry to handle the diversity and size of risks it has been asked to insure. Many Americans appear to assume that insurance is some kind of magical benefit which accrues to them without cost. Nevertheless, the premiums paid for liability insurance are necessarily added to the prices consumers pay for goods and service. It is clear that the insurance industry cannot always provide adequate coverage at affordable prices. Significantly increased deductibles or even self-insurance become the only alternatives when the risk reaches dimensions which make premiums literally prohibitive.

2. Litigiousness is on the Rise

In certain fields of law, the number of claims do show dramatic growth. In Massachusetts, between 1980 and 1984, the number of claims brought against municipalities increased 400 percent; claims involving liquor liability rose 100 percent; and claims against day-care centers increased 188 percent. As a result of the increase in liability exposure, commercial insurance rates rose 559 percent for municipalities, 234 percent for sellers of alcoholic beverages, and 261 percent for child care centers.

Case filings in federal district courts have risen fourfold from 19 per 100,000 population in 1900 to 80 per 100,000 in 1980. The National Center for State Courts likewise reported a long-term upward trend in state court filings.

In Massachusetts, the situation is deteriorating despite the recent introduction of long-needed reforms in the way motions are scheduled and in the assignment

of specific cases to individual judges by lottery. Over 70,000 civil suits are pending in the state's principal trial court—the Superior Court.

The situation is no better in the United States District Court for the District of Massachusetts, where nearly 2,400 cases had been pending for more than three years as of last year. One extended criminal trial can wreak havoc because of the backup it creates for civil cases.

In both of these courts, it is obvious that more judges are needed. Existing judges can handle new filings or try to eliminate the oldest cases, but they cannot do both at the same time given the sheer number of cases in both categories. As the following table shows, Massachusetts and Maine have a significantly lower ratio of trial judges to population than does New England or the nation as a whole:

State	Number of Judges Per 100,000 Population
Connecticut	9.2
Maine	4.8
Massachusetts	4.8
New Hampshire	11.6
Rhode Island	9.1
Vermont	8.1
United States	8.8

Massachusetts did create 37 new judgeships last year, but has yet to provide funding.

Massachusetts judges also need more direct secretarial support; increased court personnel, such as law clerks and court officers; and improved facilities in which to house them. For that state's trial judges, the "new courthouse" in Boston's Pemberton Square is now more than 50 years old and needs substantial upgrading.

Public confidence in the courts will rapidly disintegrate if gridlock develops in the resolution of cases.

Public confidence in the courts will rapidly disintegrate if gridlock develops in the resolution of cases. Based on the available comparative data, both Maine and Massachusetts need an infusion of judicial resources quickly.

Some modest progress in handling caseloads can be attained through increased judicial efficiency. Individual judges have tried to streamline their courts. Such experiments are important, but they do not have the impact that additional judges and related court personnel would.

We can certainly expect that the benefits of office automation will reach the judicial systems in the New England states in the 21st century. Conferences by telephone should become routine. Court papers can be filed and served by facsimile transmission. Lawyers' availability for hearings and trials can be determined by computerized databases.

It is nevertheless the belief of this Commission that a good judge can do the most to produce prompt resolution of legal disputes apart from whatever "tools" are made available to the judiciary by society. Judges can enforce accountability, and can expedite the process. They can frustrate delaying tactics, induce settlement of many matters that should be concluded without trial, and expedite the trial of those which must be resolved in that manner.

We applaud the work of the ABA's Action Commission to Reduce Court Costs and Delay, and concur with its finding that much can be done to relieve court con-

gestion through judicial case management, procedural simplification, and a commitment to improving existing procedures.

Some procedural reforms in other states deserve implementation in New England. In 1980, Kentucky adopted rules which impose deadlines on pleadings, presumptive fast-track schedules and discovery limits. The ABA Action Commission found them to be effective in reducing court delays and overall legal costs. Massachusetts has moved to a tracking system for all civil cases filed since July 1, 1988.

In the final analysis, perhaps, the public needs to understand and accept the fact that the administration of justice is inefficient by its very nature. Trials cannot be conducted with a stop watch, nor should we try to force the disposition of each litigated controversy within some arbitrary period of time.

Effective guidelines for litigation cost containment have been developed by a joint committee of the Oregon Trial Lawyers Association and the Oregon Association of Defense Counsel. Their premise is that reducing the time delays between the filing of a case and its final disposition will contribute significantly to reducing the cost of the litigation.

At the heart of the so-called "Oregon Plan" is the proposition that opposing counsel are to submit to each other at the outset of a case a set of ground rules solely designed to expedite disposition. Arrangements are made for the voluntary exchange of basic information; telephone conferences are used to resolve matters wherever possible; discovery is scheduled by agreement; and depositions are recorded electronically instead of by stenographic transcription if they are to be used to obtain information rather than as a basis for cross-examination. Most important, every effort is made to obtain an early evaluation by each side of the strength of its case in the hope of an early resolution.

The Kentucky and Oregon reforms maximize the opportunity to use paralegals, minimize the expense of discovery, and begin to deal with the burgeoning problem of the cost of expert witnesses. They also emphasize the value of non-binding arbitration in appropriate cases.

Such reforms seek to eliminate the excessive cost and unnecessary delay which result from lawyers' misuse of the far-ranging discovery devices (depositions, document requests, interrogatories and requests to admit facts) available to them in civil cases. In a survey of 1,000 state and federal judges conducted in 1988 by Louis Harris & Associates for Aetna Life & Casualty Co., the judges severely criticized lawyers for "abusing discovery and thereby raising litigation costs." Lawyers acknowledged the problem exists, but contended judges had the power to remedy the situation.

In the final analysis, perhaps, the public needs to understand and accept the fact that the administration of justice is inefficient by its very nature. Trials cannot be conducted with a stop watch, nor should we try to force the disposition of each litigated controversy within some arbitrary period of time. The quest for due process, like the conduct of elections in a democracy, is inherently time-consuming and costly. If expense and delay continue to prove to be endemic, that price must be weighed against the essential benefits afforded by our system of justice.

Commission Findings

- The perception of a civil litigation "crisis" may depend upon the vantage point from which one looks at the system. If there is a crisis, there is certainly no single cause or culprit. We conclude that the deep public perception of a problem continues be-

cause of the excesses of some plaintiffs, some defendants, some insurance companies and some lawyers. A seriously understaffed judiciary contributes measurably to the problem in a state like Massachusetts.

- There is almost always too much delay and too much expense in civil litigation. But these negative aspects of the system may be largely the consequence of due process. With proper constraints, the continued use of contingent fees, however, need not contribute disproportionately to these downside perceptions.

- The New England states should pursue the procedural reforms which have recently proved to be effective in Kentucky and Oregon in the area of controlling the excesses of untrammeled discovery. At all times we should emphasize the central role of the judge in the administration of justice. Able judges can dominate the system and make it work effectively.

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- *Renewing Excellence: The 1984 New England Legislative Survey.* A regional project supported by the Fund for the Improvement of Postsecondary Education.
- *A Threat to Excellence. The preliminary report of the Commission on Higher Education and the Economy of New England.*
- *Business and Academia: Partners in New England's Economic Renewal*
- *Financing Higher Education: The Public Investment*
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